IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NICHOLAS J. CENCICH, Appellant.	No. 32532-2-II UNPUBLISHED OPINION

ARMSTRONG, J. -- Nicholas J. Cencich appeals the trial court's denial of his motion to require the State to renew a plea offer the State made before a jury convicted him of more serious charges. Cencich argues that his several trial counsel were ineffective for failing to convey or discuss the State's plea offer with him. In his statement of additional grounds for review, Cencich claims that the State failed to preserve material exculpatory evidence and that the State presented insufficient evidence to support his first degree attempted murder conviction. We find no error and, thus, affirm.

FACTS

Juries have twice convicted Nicholas J. Cencich of attempted first degree murder. Between the first and second trials, Cencich moved to compel the State to renew the plea offer it made before the first trial.

At a hearing on the motion, Cencich asserted that trial counsel had never told him about the offer; the hearing testimony centered on this issue. The trial court denied the motion, ruling that Cencich had not shown either that counsel was ineffective or that counsel's representation prejudiced him, the two prongs of an ineffective assistance claim. The trial court entered findings and conclusions supporting its ruling. Although Cencich argues several trial errors in his statement of additional grounds (SAG)[1], this appeal focuses on the trial court's ruling on his plea renewal motion.

A. The Underlying Crime

John Stocks, an attorney, and Jerry Sinks, a process server, drove to Cencich's home to serve Cencich with documents requiring his appearance in court for a back child support case. Stocks and Sinks drove in Sinks's truck, leaving Stocks's car at a nearby gas station. Stocks knew and recognized Cencich. Shortly after they arrived at Cencich's house, Cencich arrived in his car. Sinks approached Cencich and asked him if he was Nick Cencich. Cencich said no. Because he did not believe Cencich, Sinks dropped the papers in Cencich's lap and returned to the truck.

Cencich then got out of his vehicle and approached the truck, demanding that Sinks roll down the window. When Sinks refused, Cencich wadded up the papers and threw them in the back of the truck. Sinks then got out of the truck, grabbed the papers, and threw them onto Cencich's property. Cencich told Sinks and Stocks that he was calling the police. Sinks and Stocks then left Cencich's property and drove to the gas station to call 911 and explain their version of the story.

[1] RAP 10.10.

The 911 dispatcher sent a deputy to clear up the matter and told Stocks and Sinks to return to Cencich's property. Back at Cencich's property, the two waited in Stocks's car for the deputy. After a short time, Cencich drove up to Stocks's car and exchanged words with Stocks, who was sitting in the driver's seat. When Stocks turned to look at Sinks, who was sitting in the front passenger seat, he saw something out of the corner of his eye. When he looked up, Cencich had a gun pointed at his head.

As Cencich fired the gun, Stocks leaned back. The bullet missed Stocks and went in and out of Sinks's stomach, across his elbow, and into the passenger side door.

Stocks fled the scene, called 911, and drove to a nearby fire station where Sinks received medical attention. Cencich also fled the scene, drove west on State Route 101, dismantled his gun, and threw it into some mud in Puget Sound. Police arrested Cencich before he returned home.

B. Pretrial Motions and Hearings

The State initially charged Cencich with one count of first degree assault and one count of second degree assault. Thurston County Deputy Prosecutor John Jones[2] drafted a plea agreement, offering to recommend a 147-month sentence if Cencich pleaded guilty to one count of first degree assault and one count of second degree assault.

At Cencich's first arraignment, Jones served Cencich and Tim Healy, Cencich's pretrial counsel, with the State's plea offer, stating that "[t]he record should reflect I have served a copy of the State's offer and discovery on the defendant and Mr. Healy." Report of Proceedings (RP) (Oct. 3, 2003) at 34. The offer stated that, if Cencich did not accept the offer before the omnibus

[2] Although Jones represented the State in the pretrial proceedings, Deputy Prosecuting Attorney Robert Lund tried the case.

hearing, the State would amend the charges to first degree attempted murder and first degree assault, both with firearm enhancements.

At a bail hearing, Brett Purtzer, Cencich's trial counsel, stated that Cencich wanted to proceed to trial and argue self-defense. At the later hearing on Cencich's motion to compel the State to renew its original offer, Jones testified that the bail hearing was the first time defense counsel mentioned pursuing a self-defense strategy. Jones said that, based on his conversations with Purtzer, he understood Cencich's wish to pursue self-defense at trial as an implicit rejection of the State's plea offer. Jones testified that, after hearing Cencich wished to pursue self-defense, "[Jones] was withdrawing [the offer] at that time," even if Cencich had not rejected it. RP (Oct. 8, 2003) at 30. Jones then told the court that "if this matter was going to go to trial[,] . . . it was going to go to trial based on those charges . . .[that] probable cause [supported]." RP (Oct. 8, 2003) at 30.

Accordingly, the State amended the charges to first degree attempted murder and first degree assault, both with firearm enhancements. At the evidentiary hearing, Purtzer said that by the time of the bail hearing, he had reviewed the discovery material in light of the plea offer but he could not remember whether he discussed the offer with Cencich.

At his first trial, the jury rejected Cencich's self-defense claim and found him guilty of first degree assault and attempted first degree murder with firearm enhancements for both counts. On appeal, we remanded for a new trial on the first degree attempted murder charge because the court failed to instruct the jury on second degree attempted murder as a lesser included offense. *State v. Cencich*, 2001 Wash. App. LEXIS 329 (Feb. 23, 2001). We affirmed the first degree assault conviction.

Before his second trial, Cencich filed

numerous motions, including a motion for the presentation of a plea offer the State made in 1997 that Cencich claimed his trial attorneys had failed to inform him about.[3] Cencich maintained that, at some time during the first appeal, he discovered a plea offer attached to a brief that nobody had shown to him.

After the evidence hearing, the trial court denied Cencich's motion to compel the State to renew its original plea offer, ruling that the motion was based on a claim that counsel was ineffective and that Cencich failed to establish counsel's deficient performance or any resulting prejudice.

At Cencich's second trial, the jury again rejected his self-defense claim and convicted him of attempted first degree murder committed with a firearm. The trial court sentenced Cencich, who had an offender score of 0, to a 264-month standard range sentence with a consecutive 60-month firearm enhancement. The trial court ran that sentence consecutively to the sentence it had previously imposed on Cencich for his first degree assault conviction.

ANALYSIS

Cencich assigns error to most of the trial court's factual findings and to both of the trial court's conclusions of law entered after the hearing on his plea renewal motion.

I. Standard of Review

In reviewing findings of fact, we ask whether substantial evidence--evidence sufficient to persuade a rational fair-minded person the premise is true--supports the trial court's findings. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). If substantial evidence supports the trial court's findings, we will not substitute our judgment for the trial court's. *State v. Black*, 100

[3] Cencich appeared pro se in his second trial and for his motion to present the State's plea offer.

Wn.2d 793, 802, 676 P.2d 963 (1984). And unchallenged findings of fact are verities on appeal. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (citing *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003)).

We review a trial court's conclusions of law de novo. *Levy*, 156 Wn.2d at 733 (citing *Mendez*, 137 Wn.2d at 214). If substantial evidence supports the trial court's factual findings, then we ask whether those findings support the trial court's legal conclusions. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002).

II. Ineffective Assistance of Counsel

1. Ineffective Assistance in General

Both the Sixth Amendment to the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 421, 114 P.3d 607 (2005). Counsel is ineffective when his performance falls below an objective standard of reasonableness and this failing prejudices the defendant. *Strickland*, 466 U.S. at 687-88.

In an evidentiary hearing, the defendant bears the burden of proving deficient performance by a preponderance of the evidence. *See State v. Robinson*, 138 Wn.2d 753, 770, 982 P.2d 590 (1999). A defendant establishes prejudice by showing "a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996) (citing *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. To prevail on an ineffective assistance claim, a defendant must prove both prongs of the *Strickland* test.

Strickland, 466 U.S. at 697.

To avoid the distortion of hindsight, we presume that counsel effectively represented the defendant. *Strickland*, 466 U.S. at 689; *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

2. Counsel's Duty With Respect to Plea Offers

During plea bargaining, counsel must "'actually and substantially [assist] his client in deciding whether to plead guilty.'" *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (quoting *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901 (1981)). Counsel's duty includes communicating actual offers, discussing tentative plea negotiations, and discussing the strengths and weaknesses of the defendant's case so that the defendant knows what to expect and makes an informed decision on whether to plead guilty. *State v. James*, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987).

3. Cencich's Trial Counsel's Failure to Apprise Him of the Plea Offer

A. The Findings

The trial court found that, based on earlier probable cause findings, Cencich understood that probable cause existed to file charges of first degree attempted murder and first degree assault. It also found that, based on Cencich's experience with forensic psychological evaluations, former employment at Western State Hospital, and experience with community supervision of felony offenders through employment with the Department of Corrections, he would have understood the seriousness of the potential charges he faced. The trial court further found that Cencich would have understood that the charges listed in the information were less serious than what the State could have charged; that the prosecutor drafted a plea offer recommending a 147-month sentence if Cencich pleaded guilty as

charged;[4] and that if Cencich declined to plead guilty before the omnibus hearing, the State would increase the charges to first degree attempted murder and first degree assault.

The trial court also found that at Cencich's first arraignment, the prosecutor served the State's plea offer and the discovery in the case on Cencich's pretrial attorney and that although the attorney could not recall whether he talked with Cencich that day about the State's plea offer, he routinely speaks with his clients about plea offers when served with one. The trial court found that the arraignment hearing record demonstrated that Cencich and Timothy Healy, his counsel, discussed the charges in the information before arraignment; that Healy delivered the State's plea offer to the office of Brett Purtzer and Monte Hester, the attorneys who represented Cencich at trial; that those attorneys placed the State's plea offer in Cencich's pleadings binder; and that those attorneys routinely sent their clients copies of any documents placed in the pleadings binder for that client's case.

In addition, the trial court also found that Purtzer routinely discussed plea offers in the context of discussing a possible trial in the case and that, although Purtzer could not specifically remember discussing a plea offer with Cencich, he and Cencich talked about the case and Cencich decided to go to trial and claim self-defense. Based on Cencich's decision, Purtzer asserted Cencich's self-defense claim at the bail hearings and stated that Cencich would advance that claim at trial. The prosecutor, in response to Cencich's request for a reduction in bail, filed a memorandum with the trial court that recited the State's offer. Cencich's trial attorney's firm also placed that memorandum in Cencich's pleadings binder.

The trial court further found that the prosecutor amended the information with more

[4] As previously noted, the initial information alleged one count of first degree assault and one count of second degree assault.

serious charges because he understood that Cencich rejected the State's plea offer when he decided to argue self-defense. During Cencich's arraignment on the first information, the prosecutor stated that Cencich had been on notice for more than one month that the State would file an amended information if he did not plead guilty to the original charges. It found that neither Cencich nor his attorney expressed surprise or disagreement with the prosecutor's assertion; and that during the jury trial, Cencich did not deny his attorney's assertion that Cencich knew of the potential penalties he faced for the charges contained in the amended information.

The trial court ultimately found that, although the amended charges carried the potential for a substantially harsher sentence than the State's plea offer, Cencich sought a complete acquittal rather than agreeing to the more than 12-year recommendation the State offered. It then characterized Cencich's plea renewal motion as an ineffective assistance claim and concluded that Cencich did not (1) demonstrate by a preponderance of the evidence that his counsel failed to inform him of the plea offer or (2) establish a reasonable probability that counsel's alleged deficient performance prejudiced him.

B. Cencich's Argument

Cencich faults his trial counsel for not telling him about the State's plea offer before the first trial. He argues that as a result, he went to trial, the jury convicted him, and the court imposed a sentence three times greater than the sentence he would have received under the State's offer.

During Cencich's pretrial hearings, Purtzer had four other cases pending trial, including a case in which the State sought the death penalty for one of his clients. Cencich's theory during the evidentiary hearing was that Hester and Purtzer were so busy they forgot to discuss the plea offer with him. Although Cencich assigns error

to the trial court's conclusions of law and to all but two of the trial court's findings of fact, Cencich does not argue a lack of substantial evidence to support the court's findings. Rather, Cencich continues to maintain that his attorneys never told him about the State's offer.

Cencich cites *In re Personal Restraint of McCready*, 100 Wn. App. 259, 263-64, 996 P.2d 658 (2000), for the proposition that failure to advise a defendant of a plea offer constitutes per se defective performance. In *McCready*, defense counsel failed to inform the defendant of the mandatory minimum sentence for first degree assault with a firearm, which the State said it would charge if the defendant rejected the State's plea offer. *McCready*, 100 Wn. App. at 262-63. The court held that because counsel failed to advise the defendant of the maximum and minimum sentences the court could impose for the charged offenses, the defendant made an uninformed decision to reject the plea offer. *McCready*, 100 Wn. App. at 263. And this failure to advise the defendant "of the available options and possible consequences constitute[d]" deficient performance. *McCready*, 100 Wn. App. at 263 (citing *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981)).

McCready is distinguishable. There, the defendant did not understand the consequences of rejecting the offer. *McCready*, 100 Wn. App. at 263. Cencich does not argue that he was unaware of the maximum and minimum sentences the court could have imposed under either the first or the amended information.

Here, the court held the evidentiary hearing six-and-a-half years after the State presented the offer.[5] Neither Healy nor Purtzer could recall specifically discussing the State's plea offer.

[5] The prosecutor served the State's plea offer on Healy, who appeared on Cencich's behalf at the February 10, 1997 arraignment. The trial court held the evidentiary hearing regarding Cencich's motion to present the State's plea offer on October 3, 2003, and October 8, 2003.

Cencich testified that "[a]t no time did . . . Mr. Hester or Mr. Healy or Mr. Purtzer[] present . . . the State's written plea offer, . . . go over it . . . [or] discuss the ramifications [or] pros and cons." RP (Oct. 3, 2003) at 97. But on cross-examination, Cencich admitted that, like Healy, he did not recall the events that took place on the day the State presented the offer. The record shows that, at Cencich's February 10, 1997 arraignment, Jones, the prosecutor, stated, "The record should reflect I have served a copy of the State's offer and discovery on the defendant and Mr. Healy." RP (Oct. 3, 2003) at 99. Furthermore, at Cencich's second arraignment, during argument on Cencich's continuance request, Jones argued that "[s]econd of all, the defense has been on notice since February 10 that if there was not a guilty plea to the original charges that these are the charges that would be filed against him." RP (Oct. 8, 2003) at 35. Neither Cencich nor his counsel acted surprised or denied Jones's allegation.

Although Healy repeatedly testified that he did not recall discussing the plea offer with Cencich, he said he had no reason to believe that he and Cencich did not discuss the offer. Indeed, Healy said that his normal practice, and his practice during Cencich's arraignment hearing, included discussing plea offers with his client upon receiving the offer. He further testified that his normal practice, and his practice at the time of Cencich's arraignment hearing, would have been to give that document to Hester and/or Purtzer so that they "would be able to go over it with [Cencich] as well." RP (Oct. 3, 2003) at 29, 36.

Purtzer first appeared on Cencich's behalf at a bail hearing held about two weeks after the State presented the plea offer. Purtzer testified that he could not specifically remember if he and Healy discussed the State's plea offer. He also said that he placed the State's offer in his firm's pleadings binder and that, at that time, the firm gave its clients copies of every document in the pleadings binder. Purtzer admitted that several

documents in Cencich's pleadings binder had a "copy to client" stamp on them, while the State's plea offer did not. RP (Oct. 8, 2003) at 87-88. But Purtzer testified that some documents that the firm sent to clients did not have stamps and that the lack of a stamp did not mean the firm had failed to send it to the client. Cencich testified that although he never received the State's plea offer, Hester and Purtzer sent him several documents from his pleadings binder.

Purtzer also testified that, because he had not interviewed any witnesses before the State presented its offer, he did not know whether the State's offer was a good offer. He said that he and Cencich eventually reviewed the discovery and decided to go to trial because Cencich wanted to argue self-defense. Purtzer said that he probably would not have conveyed any information regarding the State's plea to Cencich aside from providing the offer and telling him that the State wanted him to plead as charged. He said that he and Cencich based their decision to go to trial on the discovery material and Cencich's claimed defense; not on the plea offer. Purtzer testified that Cencich never wavered about the decision. According to Purtzer, "It was a self-defense case. That's what was testified to at trial, that's what the client wanted to do, and that's what we did." RP (Oct. 3, 2003) at 75.

Purtzer and Jones both testified that they spoke to one another about the State's plea offer. Purtzer told Jones that it was a self-defense case and that "Cencich[] wanted to go to trial." RP (Oct. 3, 2003) at 73-74. Jones testified that "[he] was incredulous that . . . [Cencich] was going to pursue [a self-defense theory]." RP (Oct. 8, 2003) at 29. He said that he took Purtzer's statement as a rejection of the plea offer and that even if Cencich's decision to claim self-defense was not a rejection, "[Jones] was withdrawing [the offer] at that time . . . to . . . pursu[e] other charges." RP (Oct. 8, 2003) at 30.

Cencich's only supporting evidence is

his bald assertion that he did not receive the plea offer and that the plea offer did not have a stamp labeled "copy to client" on it. Yet, the record shows that (1) the State served Healy with its offer in Cencich's presence; (2) Healy delivered the State's plea offer to Hester's and Purtzer's office; (3) someone placed the State's offer in Cencich's pleadings binder at Hester's and Purtzer's office; (4) Cencich heard Jones argue that Cencich knew about the State's offer and Cencich did not act surprised or deny knowing about the offer; (5) Healy and Purtzer both testified that they routinely communicated plea offers to their clients; (6) Healy and Purtzer both believed that there was no reason they would not have communicated the State's offer to Cencich; and (7) Purtzer said that the fact that the plea offer did not have a stamp stating "copy to client" did not necessarily mean that the client did not receive the document.[6] Furthermore, Cencich acknowledged that, like his attorney, he had no independent recollection of the events on the day the State served the plea offer.

The trial court essentially concluded that Cencich had not met his burden of proving by a preponderance of the evidence that his attorneys failed to tell him about the State's offer. Undisputed substantial evidence amply supports the trial court's conclusion. Because Cencich has not shown that counsel performed deficiently, we do not address the second prong: whether Cencich proved that he would have accepted the offer had his attorneys properly advised him of

[6] Cencich does not assign error to the trial court's finding that although Healy could not specifically recall speaking with Cencich concerning this plea offer, it was his standard practice at the time to discuss plea offers with his client before ending his contact with his client at the arraignment. Nor does Cencich assign error to the trial court's finding that while Purtzer could not specifically recall whether he discussed the plea offer with Cencich, it was Purtzer's standard practice to discuss plea offers in the context of a discussion concerning a possible trial in the case. These findings, as well as the trial court's unchallenged findings that Purtzer and Cencich discussed the possibility of a trial and that Cencich made the decision to go to trial and assert a self-defense claim, are verities for purposes of this appeal. *See Levy*, 156 Wn.2d at 733 (unchallenged findings of fact are verities on appeal).

it. *See State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995) (citing *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991)) (if either *Strickland* prong is satisfied, the inquiry need go no further).

III. Statements of Additional Grounds for Review (SAG)

1. Failure to Preserve Evidence

Cencich argues that the trial court should have granted his motion to dismiss because the investigating authorities failed to preserve evidence essential to his defense. Specifically, he claims that the Thurston County Sheriff's Office detectives and the prosecutor deprived him of any opportunity to independently examine and inspect Stocks's car and the red tee shirt Sinks was wearing when Cencich shot him.

The trial court held a hearing on this issue and ruled that the State had not failed to preserve material exculpatory evidence. At trial, Cencich renewed his motion, which the trial court again denied, finding that police impounded Stocks's car to search for a bullet and to determine bullet trajectory; that after investigators found the bullet and took photographs to determine trajectory and the damage the bullet caused, they returned the car to Stocks; that Cencich did not ask the authorities to retain the car as evidence or ask to take measurements of the vehicle; that police retained and took photographs of Sinks's red shirt but that neither party requested specific examination or analysis of the shirt or that the shirt be preserved; that the sheriff's office destroyed the shirt after trial because it had blood stains that presented a health risk; and that since the sheriff's office had destroyed the shirt, and the car had been repaired and sold, both experts had to do without certain evidence.

The trial court concluded that (1) Cencich failed to show that either the car or the shirt constituted material exculpatory evidence, and

(2) the authorities did not act in bad faith or inexcusably mishandle the destruction of the shirt and the release of the car.

The Fourteenth Amendment of the United States Constitution and article I, section 3 of the Washington Constitution require the State to preserve material exculpatory evidence in a criminal trial. *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994) (citing *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)). If the State fails to preserve material exculpatory evidence, the trial court must dismiss criminal charges. *Wittenbarger*, 124 Wn.2d at 475. Material exculpatory evidence is evidence that, before its destruction, has apparent exculpatory value and is of "a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Wittenbarger*, 124 Wn.2d at 475 (citing *Trombetta*, 467 U.S. at 489). A showing that the evidence *might* have exonerated the defendant is insufficient. *Wittenbarger*, 124 Wn.2d at 475.

At trial, Cencich contended that he shot Sinks because he thought Sinks had pulled a gun out from underneath his black leather jacket. Cencich argues that Sinks's tee shirt was material exculpatory evidence because it had lead residue on it that would show that Sinks had a firearm. Cencich does not explain what specific exculpatory evidence he expected the car to yield, only that the car contained valuable, material, and relevant bullet trajectory evidence.

Without pointing to specific exculpatory evidence in the car, Cencich's argument fails. His general contention that the car contained bullet trajectory evidence tells us nothing about how the bullet trajectory would support Cencich's self-defense claim. The bullet trajectory would show only that Cencich fired at Sinks, a fact conclusively established by Sinks's bullet wound. It tells us nothing, at least that is readily apparent, about why Cencich fired at Sinks, the critical issue in his self-defense claim. Thus, Cencich

does not show that the trajectory evidence would be even potentially useful. *See Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). The failure to preserve potentially useful evidence does not deny a defendant due process unless the defendant can show that the State acted in bad faith. *Youngblood*, 488 U.S. at 58. Cencich makes no such showing.

Cencich's argument that Sinks's tee shirt constituted material exculpatory evidence also fails. As we have discussed, we review a trial court's factual findings for substantial supporting evidence. *Mendez*, 137 Wn.2d at 214. And if substantial evidence supports the trial court's findings of fact, then we must determine whether those factual findings support the trial court's legal conclusions. *Vickers*, 148 Wn.2d at 116.

Cencich argues that the defense bullet-trajectory forensic expert testified that Sinks's red shirt would show lead deposits establishing that Sinks had a firearm. Similar to the car, the defense did not place the shirt into evidence at the first trial. Arguably then, the shirt did not have an apparent exculpatory value before the police destroyed it. *See Wittenbarger*, 124 Wn.2d at 475. Furthermore, the defense bullet-trajectory forensic expert did not testify that Sinks's shirt would show lead deposits; rather, he testified that the shirt would have given the best information as to whether there was an elevated level of lead on Sinks's clothes, which would be some evidence of whether a firearm had been present. The expert had tested the black leather jacket Sinks was wearing at the time of the incident, and he did not find a level of lead any higher than would have resulted from manufacturing the jacket. Again, Cencich fails to demonstrate that Sinks's shirt contained material exculpatory evidence.

2. Speedy Trial

Cencich argues that the trial court should have granted his motion to dismiss the case because of mismanagement, violation of the

speedy trial rule, and forcing him to choose between two competing constitutional rights. Cencich lists several cases and cites to appendix 2 of his SAG. RAP 10.10(b) limits statements of additional ground for review to 50 pages. Appendix 2 is not located within the first 50 pages of Cencich's SAG.[7] Moreover, RAP 10.10(c) requires Cencich to inform us of the "nature and occurrence of the alleged errors." Because Cencich provides no guidance on the nature and occurrence of his speedy trial claim and also violates RAP 10.10(b), we do not review the issue. *See* RAP 10.10(c)

3. Attorney-Client Privilege Violations

Cencich again lists several cases and cites to appendix 3 to support his argument that the trial court erred in denying his motion to dismiss for violations of the attorney-client privilege. SAG at 22. Appendix 3 is not located within the first 50 pages of Cencich's SAG. RAP 10.10(b). Moreover, we do not address this issue because he again fails to inform the court of the nature and occurrence of the alleged error. RAP 10.10(c).

4. Introduction of Cencich's First Conviction During His Second Trial

Cencich argues that the trial court should not have allowed the State to introduce evidence of his conviction of count I during the retrial of count II. The trial court, at a pretrial hearing, granted Cencich's motion requesting that the State refrain from mentioning his

[7] Cencich's SAG is well over 200 pages long.

conviction on count I to the jury during the retrial of count II.

Cencich argues that when the trial court, later that day, ruled to admit photographs documenting the gunshot wounds Sinks suffered in the shooting, the court unfairly prejudiced him. Cencich fails to explain how the gunshot wound photographs advised the jury of his earlier first degree assault conviction. Because he fails to inform the court of the nature of his argument, we do not address it. RAP 10.10(c).

5. Firearm Enhancement Instruction

Cencich contends that the trial court erred by instructing the jury on the firearm enhancement and by imposing a 60-month firearm enhancement. He claims that the firearm enhancement in his case was contrary to the voters' intent in passing Initiative 159 because he lawfully owned a firearm and had a concealed weapons permit. Again, Cencich provides no meaningful argument to support this novel proposition and we decline to address it. RAP 10.10(c).

6. Double Jeopardy

Cencich next argues that the trial court violated the double jeopardy clause when it retried him on count II after we remanded the case for retrial. But double jeopardy does not bar retrial of a conviction we reverse for trial court error. Again, because Cencich provides no guidance as to why the general rule does not apply here, we decline to address the issue. RAP 10.10(c).

7. Insufficient Evidence of Premeditation and Intent

Cencich argues that the evidence is insufficient to establish premeditation and intent to support his first degree attempted murder conviction. He maintains that the prosecutor never argued that Cencich shot at Stocks with the intent to murder him, citing the State's closing argument and the testimony from several

witnesses. But the attorneys' arguments are not evidence, and the State can prove Cencich's intent from the conduct and the circumstances surrounding the shooting. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 712, 101 P.3d 1 (2004).

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, a rational trier of fact could find the crime's essential elements beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993) (citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). In reviewing a sufficiency of the evidence claim, we draw all reasonable inferences from the evidence in favor of the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). We do not review credibility determinations, which lie within the jury's exclusive province. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335 (1987)).

To convict Cencich as charged, the jury had to find beyond a reasonable doubt that Cencich took a substantial step toward causing Stocks's death, that Cencich acted with the intent to cause Stocks's death, and that Cencich acted with premeditation. Former RCW 9A.32.030(1)(a) (1996); Former RCW 9A.28.020 (1996).

At trial, Cencich admitted that he intentionally fired a shot into Stocks's car. Cencich argued that he fired the shot in self-defense because Sinks had a snub-nose revolver in his hand when Cencich pulled up to the car.

The evidence showed that Sinks tried to serve Cencich with some papers in a child support dispute and that a verbal confrontation ensued. Cencich then told Sinks and Stocks that he was calling the police, so Sinks and Stocks drove to a nearby gas station to call 911 and give their side of the story. Cencich never actually

called the police.

Stocks called 911 and the dispatcher told him that a deputy would meet him at Cencich's residence. Stocks and Sinks then returned to Cencich's house and, shortly thereafter, Cencich pulled out of his driveway and alongside Stocks's and Sinks's car so that Cencich's and Stocks's driver's side windows faced each other and were about one foot apart. Cencich rapped on Stocks's window and Stocks lowered his window. Cencich demanded to know who Stocks and Sinks were. Stocks replied that he was an officer of the court and that Sinks was his employee.

Cencich and Stocks talked for a short time. Stocks then looked over at Sinks, and as he turned away he saw something out of the corner of his eye that caused him to look back at Cencich. As Stocks turned towards Cencich, he saw that Cencich had a gun pointed at his head. Stocks jerked his head back, heard a loud boom, and smelled gun powder. The bullet missed Stocks and went in and out of Sinks's stomach, across his elbow, and into the passenger side door.

Stocks drove away immediately after Cencich fired the shot. Cencich also left and drove to a beach where he dismantled his 9 mm Glock and threw pieces into some mud in Puget Sound.

The jury could have found that Cencich angrily confronted Stocks and Sinks in a dispute over serving him; that he falsely claimed to have called the police; that during his second confrontation with Stocks and Sinks, he attempted to shoot Stocks at close range in the head; that after he fired the shot, he fled the scene and disposed of the gun. From these circumstances, the jury could easily find that Cencich shot at Stocks intending to kill him and that he had the time to and, in fact, premeditated his decision to kill Stocks. *See State v. Commodore*, 38 Wn. App. 244, 248, 684 P.2d 1364 (1984) (defendant proceeding to a room where he knew he would find a gun, and returning to shoot the victim, implied

premeditation).

Cencich's claim that he fired in self-defense was for the jury to evaluate. The jury had no obligation to accept Cencich's claim and it obviously did not. We lack the authority to review and alter this jury decision. *See Camarillo*, 115 Wn.2d at 71 (citing *Casbeer*, 48 Wn. App. at 542). We conclude that sufficient evidence supports Cencich's first degree attempted murder conviction.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Hunt, J.

Van Deren, A.C.J.